Supreme Court, U.S.
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No. 92-1177

In the Supreme Court of the United States

OCTOBER TERM, 1992

CARL HAROLD MYERS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court committed plain error by instructing the jury that petitioner's use of a stun gun on persons held in custody at a police station should be evaluated under the reasonableness standard of the Fourth Amendment.

2. Whether 18 U.S.C. 242 is void for vagueness because it does not define the term "bodily injury."

3. Whether the district court, which explained that "[b]odily injury * * * includes physical pain as well as any burn or abrasion," Pet. App. 17a, properly instructed the jury as to the meaning of that term.

4. Whether the district court abused its discretion by allowing petitioner's stun gun to be activated before the jury and by refusing to permit a 35-minute tape recording to be played in its entirety during the trial.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 9a-36a) is reported at 972 F.2d 1566.

JURISDICTION

The judgment of the court of appeals was entered on September 25, 1992. A petition for rehearing was denied on November 30, 1992. The petition for a writ of certiorari was filed on January 11, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Georgia, petitioner was convicted on two counts of depriving persons of their civil rights by shocking them with a stun gun, in violation of 18 U.S.C. 242. Pet. App. 9a-10a.[1] One of the counts of conviction was charged as a felony, because petitioner's actions resulted in bodily injury.[2] Petitioner was sentenced to concurrent terms of 12 and 18 months' imprisonment on the two counts. *Id.* at 14a.

1. Petitioner was a Captain with the Doraville, Georgia, Police Department. A stun gun is not an authorized weapon of the Doraville Police Department, and petitioner had been so advised by both the Chief and the Assistant Chief of Police. Pet. App. 10a, 11a, 22a n.6.

On August 25, 1988, at about 1:30 a.m., Frederick Cowan was arrested for driving under the influence of alcohol and resisting arrest. Cowan was transported to the Doraville police station and placed in a holding cell. Throughout the night, Cowan yelled, kicked the bars of his cell, and asked to see a doctor. At approximately 5:15 a.m., petitioner entered Cowan's cell along with two police dispatchers. Petitioner told Cowan to lie down and stretch his hands above his head so that they could be handcuffed to the bunk. Cowan, who was sitting on the bunk, was slow to respond. Petitioner then activated a stun gun on Cowan's chest. Cowan screamed loudly, flinched, and appeared to be in pain. After Cowan's hands were cuffed to the bunk, petitioner shocked Cowan in the

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[1] The jury did not reach a verdict on a third count charging a similar violation of 18 U.S.C. 242.

[2] Prior to November 1988, all violations of 18 U.S.C. 242, except those resulting in death, were misdemeanors. In November 1988, Congress amended the statute to provide that "if bodily injury results," the defendant is subject to ten years' imprisonment.

groin area. Cowan again screamed loudly and flinched. At the time Cowan was shocked, he had not yet been booked, fingerprinted, or formally charged with a crime by the police or any judicial officer. Pet. App. 10a-12a.

On September 21, 1989, Cesar Yanez was arrested in a parking lot for having an open can of beer in public. Yanez yelled obscenities as he was being transported to the police station. At the station, he continued to yell obscenities and challenged various officers to a fight. Yanez was then placed in a holding cell. A few minutes later, petitioner and a radio dispatcher escorted Yanez to the back of the station to be booked and processed. As Yanez walked down the hall petitioner shocked him in the back several times with a stun gun. Yanez was then told to place both hands against a wall and spread his legs so that he could be searched. While Yanez had his hands on the wall, petitioner shocked him several more times in the lower neck and back area. A few days later, a police officer observed six pairs of scabbed reddish burn marks, consistent with those left by a stun gun, on Yanez's back. Pet. App. 12a-14a.

2. The court of appeals affirmed petitioner's convictions. It first held that the district court did not commit plain error when it instructed the jury to evaluate petitioner's use of force under the reasonableness standard of the Fourth Amendment. The court explained that because petitioner had argued at trial that his conduct should have been evaluated under the Eighth Amendment, it would not resolve his belated claim on appeal that his use of force should have been analyzed under the Fourteenth Amendment's due process standard. The court added that "[a]lthough we uphold the instruction given, we wish to make it explicit that we are not deciding that the Fourteenth Amendment's * * * standard does not apply in evaluating the use of excessive force by the police in post-arrest, pre-charge cases. That issue is

not before us. We hold only that it was not plain error for the district court to give the instruction it did." Pet. App. 16a.

The court of appeals also rejected petitioner's claim that the district court improperly instructed the jury as to the definition of "bodily injury," which the court defined to "include[] physical pain as well as any burn or abrasion." Pet. App. 17a. The court held that the district court correctly defined "bodily injury" since its definition was consistent with the definition Congress had previously used in other criminal statutes. See 18 U.S.C. 831(f)(4) (prohibited transactions involving nuclear materials); 18 U.S.C. 1365(g)(4) (tampering with consumer products); 18 U.S.C. 1515(a)(5) (obstruction of justice); 18 U.S.C. 1864(d)(2) (hazardous or injurious devices on federal lands). Pet. App. 17a-19a.

The court of appeals further held that the district court did not abuse its discretion by allowing the stun gun to be activated before the jury with a fully charged battery. The court first noted that petitioner had waived any claim of error regarding the stun gun demonstration, since he had failed to object when the gun was activated. The court further held that, in any event, the demonstration was proper in light of the district court's cautionary instruction informing the jury that the battery had been recently recharged and that it "is your duty to determine whether the demonstration accurately reflects the condition of the stun gun on the occasion in question." Pet. App. 35a-36a. In addition, the court held that even if the district court had erred in allowing the demonstration petitioner was not prejudiced, as evidenced by the fact that during the trial he and his counsel chose to activate the gun before the jury on numerous occasions. *Id.* at 36a n.13.

The court of appeals also held that the district court did not err by refusing to permit petitioner to play in its

entirety a 35-minute tape recording of Cowan yelling in his cell. The court noted that petitioner was allowed to play "specific portions of the tape or a representative portion," which allowed him "the opportunity * * * to rebut Cowan's testimony that he was docile at the time of the stun gun incident." Pet. App. 36a.

ARGUMENT

1. Petitioner first contends (Pet. 13-14) that the claim that he used excessive force should have been evaluated under the Due Process Clause of the Fourteenth Amendment rather than the reasonableness standard of the Fourth Amendment.

In *Graham* v. *Connor*, 490 U.S. 386, 395 (1989), this Court held that "*all* claims that law enforcement officers have used excessive force * * * in the course of an arrest, investigatory stop, or other 'seizure' * * * should be analyzed under the Fourth Amendment['s] * * * 'reasonableness' standard." The Court explained that claims of excessive force should not be evaluated under the "more generalized notion of 'substantive due process'" when a more specific constitutional provision governs. *Id.* at 393-394, 395. Nonetheless, the Court expressly left open "the question whether the Fourth Amendment continues to provide individuals with protection against the deliberate use of excessive physical force beyond the point at which arrest ends and pretrial detention begins." *Id.* at 395 n.10.

"[T]he Fourth Amendment provides an explicit textual source of constitutional protection," *Graham*, 490 U.S. at 395, for individuals who have been seized pursuant to police authority, are in police custody, and have yet to be arraigned. It protects persons from unreasonable searches and seizures, and this Court has held that "if an arrestee is taken to the police station, that is * * * a continuation of the custody inherent in the arrest

status." *Illinois* v. *Lafayette*, 462 U.S. 640, 645 (1983). See also *Dunaway* v. *New York*, 442 U.S. 200, 208 (1979). This Court has also held that "the manner in which a search or seizure is conducted" is subject to Fourth Amendment analysis. *Tennessee* v. *Garner*, 471 U.S. 1, 8 (1985).

Since this Court's decision in *Graham* v. *Connor*, the courts of appeals that have squarely addressed the issue have recognized that the Fourth Amendment applies to a claim that an officer used excessive force against a person in police custody. See, *e.g.*, *Powell* v. *Gardner*, 891 F.2d 1039, 1044 (2d Cir. 1989); *Foster* v. *Metropolitan Airports Comm'n*, 914 F.2d 1076, 1082 (8th Cir. 1990); *Hammer* v. *Gross*, 884 F.2d 1200, 1204 (9th Cir. 1989), vacated en banc on other grounds, 932 F.2d 842, 845 n.1, 850-851 (9th Cir.), cert. denied, 112 S. Ct. 582 (1991); *Austin* v. *Hamilton*, 945 F.2d 1155, 1158-1160 (10th Cir. 1991). Cf. *United States* v. *Cobb*, 905 F.2d 784 (4th Cir. 1990) (pretrial detainee's claim that police officer used excessive force while he was detained at the station evaluated under the due process standard), cert. denied, 111 S. Ct. 758 (1991).

Regardless of whether those courts are correct, further review is not warranted in this case, because the court of appeals did not hold that the Fourth Amendment standard applied to petitioner's conduct. At trial, petitioner argued only that an Eighth Amendment standard should be used, an argument petitioner subsequently abandoned. Because petitioner had relied on the Eighth Amendment and not the Fourteenth, the court of appeals refused to decide whether the Fourteenth Amendment's due process standard, rather than the Fourth Amendment's reasonableness standard, applies to a claim that a police officer used excessive force in a post-arrest, pre-charge case. Pet. App. 16a. Instead, the court merely held that the district court's instruction that the jury

should evaluate petitioner's use of force under the Fourth Amendment's reasonableness standard was not plain error in this case. *Ibid.* Therefore, contrary to petitioner's claim (Pet. 14), the court of appeals' decision does not conflict with *Wilkins* v. *May*, 872 F.2d 190 (7th Cir. 1989), cert. denied, 493 U.S. 1026 (1990), where the Seventh Circuit held that a claim that a police officer acted unlawfully when he interrogated a person at gunpoint should be evaluated under the due process standard.[3]

2. Petitioner also contends (Pet. 15-17) that 18 U.S.C. 242 is unconstitutionally vague because the term "bodily injury" is not defined in the statute. While petitioner contended at trial that the statute was unconstitutionally vague as applied, he did not challenge the constitutionality of the statute on appeal. Pet. App. 17a. Thus, the court of appeals did not rule on that issue. Ordinarily, this Court does not grant certiorari to review an issue that was neither pressed nor passed on in the court below. *United States* v. *Williams*, 112 S. Ct. 1735 (1992).

In any event, "bodily injury" has a settled meaning. As the court of appeals recognized, the district court's instruction defining the phrase is consistent with the definition of "bodily injury" contained in four other provisions of Title 18 of the United States Code. See 18

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[3] Any conflict between the Seventh Circuit's decision in *May* and the decisions of other circuits is of questionable importance in light of the Seventh Circuit's subsequent decision in *Titran* v. *Ackman*, 893 F.2d 145 (1990). In *Titran*, the Seventh Circuit said that "[m]ost of the time the propriety of using force on a person in custody pending trial will track the Fourth Amendment." *Id.* at 147. The court went on to conclude that "[i]f the officers intentionally restrained, jolted, and roughed up Titran without physical provocation from her, their behavior was unreasonable." *Id.* at 148. Thus, it appears that the Seventh Circuit would have reached the same result as the Eleventh Circuit in this case.

U.S.C. 831(f)(4) (prohibited transactions involving nuclear materials); 18 U.S.C. 1365(g)(4) (tampering with consumer products); 18 U.S.C. 1515(a)(5) (obstruction of justice); 18 U.S.C. 1864(d)(2) (hazardous or injurious devices on federal lands). Pet. App. 18a-19a. In each of those provisions, "bodily injury" is defined as: "(A) a cut, abrasion, bruise, burn, or disfigurement; (B) physical pain; (C) illness; (D) impairment of * * * function of bodily member, organ, or mental faculty; or (E) any other injury to the body, no matter how temporary." In accordance with that definition, the district court in this case instructed that "bodily injury means any injury to the body, no matter how temporary," and "includes physical pain as well as any burn or abrasion." Pet. App. 17a.

It is well settled that the test for determining whether a criminal statute is sufficiently definite so as not to violate the Due Process Clause is whether it "give[s] a person of ordinary intelligence fair notice that his contemplated conduct is forbidden." *United States* v. *Batchelder*, 442 U.S. 114, 123 (1979), quoting *United States* v. *Harriss*, 347 U.S. 612, 617 (1954). See *United States* v. *Powell*, 423 U.S. 87, 94 (1975); *Rose* v. *Locke*, 423 U.S. 48, 49 (1975) (per curiam). The type of injury inflicted by a stun gun—pain and often an associated burn—is the type of injury that a person of ordinary intelligence, familiar with the operation and effect of the weapon, would understand to constitute "bodily injury."

Moreover, "the constitutionality of a vague statutory standard is closely related to whether that standard incorporates a requirement of *mens rea*." *Colautti* v. *Franklin*, 439 U.S. 379, 395 (1979). See *Village of Hoffman Estates* v. *The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982); *Boyce Motor Lines, Inc.* v. *United States*, 342 U.S. 337, 342 (1952). The statute at issue in this case requires the government to prove that the defendant used excessive force willfully. Indeed, in *Screws*

v. *United States*, 325 U.S. 91, 101-102 (1945), this Court rejected a claim that the predecessor statute to 18 U.S.C. 242 was void for vagueness, because the statute required a defendant to act with specific intent. The Court explained, "[t]he requirement that the act must be willful or purposeful * * * relieve[s] the statute of the objection that it punishes without warning an offense of which the accused was unaware." *Id.* at 102.

There is no merit to petitioner's claim (Pet. 16) that this Court's decision in *Maynard* v. *Cartwright*, 486 U.S. 356 (1988), suggests that 18 U.S.C. 242 is void for vagueness. In *Maynard*, this Court held that an Oklahoma statute allowing a jury to consider whether a murder was "especially heinous, atrocious, or cruel" in deciding whether to impose the death penalty was unconstitutionally vague under the Eighth Amendment. *Id.* at 359, 363-364. *Maynard* is inapplicable because petitioner was not convicted of a capital offense. Indeed, because of the qualitative difference between death and other sentences, this Court has repeatedly recognized that it has applied heightened scrutiny to statutes providing for capital sentences. See, *e.g.*, *California* v. *Brown*, 479 U.S. 538, 541 (1987); *Ford* v. *Wainwright*, 477 U.S. 399, 411 (1986) (opinion of Marshall, J.); *California* v. *Ramos*, 463 U.S. 992, 998-999 (1983). Moreover, even in capital cases, this Court has held that a defect arising from a vague statutory sentencing term can be rectified by a limiting instruction that defines the term for the jury. *Walton* v. *Arizona*, 497 U.S. 639, 653-655 (1990); *Maynard* v. *Cartwright*, 486 U.S. at 364-365. See also *Proffitt* v. *Florida*, 428 U.S. 242, 255-256 (1976) (plurality opinion). The district court in this case gave a detailed limiting instruction defining the term "bodily injury." See Pet. App. 17a.

3. Nor is there merit to petitioner's argument (Pet. 15-17) that the district court improperly applied a "civil

definition" when it instructed the jury as to the meaning of "bodily injury." As we have noted, the district court in its instructions used the definition provided in other federal criminal statutes. The definition of injury used by the court was therefore not a "civil" definition.

The decision of the court of appeals is not inconsistent with *Bennett* v. *Parker*, 898 F.2d 1530 (11th Cir. 1990), *Mark* v. *Caldwell*, 754 F.2d 1260 (5th Cir. 1985), or *Raley* v. *Fraser*, 747 F.2d 287 (5th Cir. 1984), as petitioner contends. In those cases (all of which arose under 42 U.S.C. 1983, not 18 U.S.C. 242), the courts considered the extent of injury required to establish a violation of constitutional rights, and held that a claim alleging excessive force was properly denied because the plaintiff suffered only minor injuries.[4] In this case, however, the evidence showed that Yanez was stunned badly enough that he had "six pairs of scabbed reddish burn marks" on his back. Pet. App. 13a-14a. Furthermore, subsequent to the decisions cited by petitioner, this Court explained that the extent of lasting physical injury alone is not determinative of whether the use of force by a law enforcement official constitutes a constitutional violation. *Hudson* v. *McMillian*, 112 S. Ct. 995 (1992). See also *Whitley* v. *Albers*, 475 U.S. 312, 321 (1986). The duration of the signs of injury should not be the benchmark for determining whether there has been a violation, because "[m]any things—beating with a rubber truncheon, water torture, [and] electric shock * * * may cause agony as they occur yet leave no enduring injury." *Williams* v. *Boles*,

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[4] Contrary to petitioner's claim (Pet. 16), in *Culver* v. *Town of Torrington*, 930 F.2d 1456 (10th Cir. 1991), the plaintiff's Section 1983 claim was not disallowed because of the insignificance of the injury. Rather, as the court of appeals explained, "[t]here was no evidence as to where or how the bruises occurred or more specifically, that the bruises were a result" of the police officer's conduct. *Id.* at 1461.

841 F.2d 181, 183 (7th Cir. 1988). Just because the State "is careful to leave no marks" does not mean that the conduct is not serious. *Ibid.*

4. Petitioner also contends (Pet. 17-19) that the court of appeals erred by concluding that the district court did not abuse its discretion with regard to two evidentiary rulings. Petitioner's claims of error are meritless and, in any event, the court of appeals' fact-bound determinations are not worthy of further review.

Petitioner first argues (Pet. 17-18) that the district court abused its discretion by allowing the stun gun to be activated before the jury, and that the court of appeals "did not address why the [district] court decided to favor the government's contention that the stun gun was *fully charged* at the time of the events as opposed to the Defendant's opposite contentions." The district court, however, made no judgment as to the condition of the stun gun at the time of the various incidents, as evidenced by its instruction that the jury should determine whether the stun gun "presently operates in the same manner as it did on the date in question." Pet. App. 35a. In any event, petitioner has no basis to complain about the demonstration, since he and his counsel chose to activate the stun gun before the jury on several occasions. *Id.* at 36a n.13.

Petitioner also asserts (Pet. 18-19) that the district court abused its discretion by refusing to permit the 35-minute tape recording of Cowan yelling in his cell to be played in its entirety. As the court of appeals explained, the district court did not err because petitioner was allowed to play a representative sample of the tape. Pet. App. 36a. In any event, the tape recording was merely cumulative of other evidence establishing that Cowan spent the night yelling and rattling the bars of his cell and calling for a doctor before petitioner arrived at the station. Tr. 236-237, 307, 385, 828-829. In addition, all the

exhibits were sent back to the jury room at the beginning of the deliberations, Tr. 991-992, so the jury had the opportunity to listen to the tape in its entirety if it so desired.

Accordingly, there is no merit to petitioner's claim (Pet. 19) that the court of appeals' decision is inconsistent with *United States* v. *Ebens*, 800 F.2d 1422 (6th Cir. 1986), and *Steward* v. *Dameron*, 460 F.2d 278 (5th Cir. 1972) (per curiam). In those two cases, the courts held that the district courts committed reversible error by failing to play tape recordings that provided key evidence on the critical disputed issue at trial. Unlike those cases, the unplayed portion of the tape at issue in this case was cumulative, and it provided evidence pertaining to facts that were not in dispute—*i.e.*, what occurred prior to the time that petitioner entered Cowan's cell.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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